United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,234

985

ALVIN EPSTEIN, INC.
ALVIN EPSTEIN

Appellants

v.

DAVID GALFOND

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
For the
District of Columbia Circuit
FILED DEC 18 1957
Joseph W. Stewart
CLERK

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EX 3-0625

STATEMENT OF QUESTIONS PRESENTED

I

Where appellee filed suit for defamation, and each appellant moved for summary judgment which was supported by affidavit and exhibits, the question is whether the Court exceeded its statutory power to certify the entire cause to the Municipal Court for the District of Columbia although no responsive pleading had been filed by either appellant?

II

Where appellants had duly filed a motion for summary judgment previous to filing any answer or any other responsive pleading, the question is whether the Court judicially abused its discretion in referring the motion for summary judgment to the Municipal Court for the District of Columbia?

III

Where the record on appeal discloses no genuine issue of fact or law and appellants are entitled to relief pursuant to Rule 56, Federal Rules of Civil Procedure, the question is whether the appellate Court has the power to enter Summary Judgment for appellants on the merits?

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UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 14, 234

ALVIN EPSTEIN, INC.,
ALVIN EPSTEIN

Appellants

v.

DAVID GALFOND

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

David Galfond filed suit in the United States District Court for the District of Columbia claiming compensatory and exemplary damages for defamation based on two published letters. Appellants moved for summary judgment which came on for hearing before the Honorable John J. Sirica, Presiding, United States District Judge. Without ruling on the motion, the trial judge certified the motion and the entire cause to the Municipal Court for the District of Columbia on October 31, 1957. An appeal was taken to this Court on November 5th, 1957 from that order. Jurisdiction is vested in this Honorable Court by virtue of the United States Code, Title 28, Sec. 1291.

STATEMENT OF THE CASE

A suit alleging that two letters constituted libelous publications was filed by the appellee in the United States District Court for the District of Columbia. The unverified complaint, containing two counts, prays for compensatory and exemplary damages against Alvin Epstein, Inc., a Maryland Corporation, and against Alvin Epstein individually as author and disseminator of both publications.

For purposes of this appeal, the allegations considering each letter separately in each count, complain of certain unexplained material in count one as being defamatory. The letter mentioned in count two refers to a statement of unauthorized removal of property belonging to appellants by appellee which was then in the custody of the letter receiver, Home, Inc. Subsequently, the beforementioned property was returned by Home, Inc. to Appellant and the appellee is currently employed by Home, Inc.

No special damages are alleged or requested in either count. Counsel for appellee is relying on the principle that the publications are libelous per se.

Without any responsive pleading having been filed, appellants first moved for summary judgment on the ground that no special damages were shown, that it was a reasonable communication between client and competitor in the course of business, that the matters were not libelous per se, and that all matters asserted in the letters were true. No opposing affidavits or exhibits were filed by the appellee.

The motion for summary judgment came on for hearing before the Honorable John J. Sirica, District Judge, sitting in Motions Court. The Court indicated that no special damages were alleged. The appellee replied that he relied on the publications as being libelous per se; whereupon the Court, after refusing to consider the motion for summary judgment on its merits, declared that it was sitting in the

capacity of a pre-trial judge, and that the motion and the entire case would be certified to the Municipal Court for the District of Columbia. This appeal is now taken from that order (J. A. 15).

SUMMARY OF ARGUMENT

The Court has no power to certify cases to the Municipal Court before all claims are asserted and all allegations are met with responsive pleadings. If the Court has such power, it was judicially abused under the circumstances of the present case because appellants have been thus permanently precluded from asserting a counterclaim against the appellee in excess of $3000.00 for appellee's unlawful interference with advantageous business relations and also precluded from filing a third-party action against Larrabee Associates as a co-conspirator with appellee on the counterclaim, and a second count for loss of profits for services that appellants were prevented from rendering to clients now appropriated by Larrabee Associates.

In certifying the case to the Municipal Court without ruling on the pending motion for summary judgment, the Court certified a question of law to the Municipal Court: i.e., whether the publications were libelous per se. Such action amounted to an abuse of judicial discretion.

In any event, since the only issue in this cause is whether the publications were libelous per se, and, if so, whether a defense of truth and want of malice was shown by appellants' papers appearing in the record herein (JA.10-15), the Court of Appeals has the power and should enter summary judgment in this Court without remand.

ARGUMENT

I

THE DISTRICT COURT HAD NO POWER TO CERTIFY THE ACTION TO THE MUNICIPAL COURT PRIOR TO ANSWER

Title 11, Section 756, District of Columbia Code, as amended, provides in part as follows:

> "If, in any action, other than an action for equitable relief, pending on the effective date of this sub-chapter or thereafter commenced in the United States District Court for the District of Columbia, it shall appear to the satisfaction of the Court at any time prior to trial thereof that the action will not justify a judgment in excess of $3000, the Court may certify such action to the Municipal Court for the District of Columbia for trial. The pleadings in such action, together with a copy of the docket entries and of any orders theretofore entered therein, shall be sent to the clerk of the said Municipal Court together with the deposit for costs, and the case shall be called for trial in that Court promptly thereafter; * * * *" (emphasis supplied) as amended 70 Stat. 676, ch. 744, Sec. 1; July 26, 1956.

Prior to amendment in 1956, this section authorized transfer "at any pretrial hearing thereof that the action will not justify a judgment in excess of $1,000." Otherwise the pertinent portion appears to be identical.

Thus it clearly appears that the significant change relates to the dollar value of the suit. Neither section defines at what stage the action may be transferred. But "pre-trial" seems to imply that not only had an answer been filed but that all preliminary procedural motions had to be disposed of as well. The 1956 amendment deletes "pre-trial" and authorizes transfer "at any time prior to trial." Appellant contends that this language intended to authorize transfer well after pre-trial and "at any time prior to trial." It seems to authorize

transfer prior to pre-trial as well. The certification of "pleadings" seems to require more than transfer of a mere complaint. As here, the answer could have contained a counterclaim against the appellee for interference with business relations as well as a claim against Larrabee Associates for client-stealing. This situation brings the problem into focus by reflecting inappropriate, immature, inopportune and hasty transfer of a case in its embryonic and formulative stage to an inferior court and in a condition which is obviously not ready for trial. The 1956 amendment of Section 756 and the original verbiage both indicate that the matter is to be certified "for trial" with "any orders (previously) theretofore entered therein" and "the case shall be called for trial in that Court." No mention is made of pending motions' being disposed of promptly or otherwise. It appears, then, that not only is certification of a bare complaint premature, but that transfer of a pending motion that raises a question of law is not only highly improvident but actually unauthorized by Section 756 as amended.

II

ASSUMING THE COURT HAS THE STATUTORY AUTHORITY, JUDICIAL DISCRETION WAS ABUSED IN CERTIFYING THE MOTION FOR SUMMARY JUDGMENT TO THE MUNICIPAL COURT

The fact that the District Court stated that it would sit as pre-trial judge in the Motions Court is of no significance, nor does it confer any broader discretion than the court already possessed by law while sitting as a motions judge. The law is well settled by this Court that an abuse of judicial discretion by improper certification to the Municipal Court for the District of Columbia is reviewable and reversible where a showing is made that such is the case. Barnard v. Schneider et al. (U.S. App. D.C. 1957) 243 F 2d 258.

The abuse here is not that it was per se improper, but that it was premature and improper for that reason. Such haste is evident when the litigant is deprived of his opportunity of instituting such actions as authorized by the Federal rules. It is apparent from this record that possible and probable successful claims can be made against the appellee and Larrabee Associates, a recipient of one of the supposed publications. Sound procedure demands that all claims arising from one or a group of associated transactions should be asserted, combined, litigated and adjudicated in one proceeding whenever humanly possible.

Here, the Court may possibly have ended all litigation should the motion for summary judgment be granted. Appellants may not desire to litigate further if they had been given favorable consideration on the motion. Be that as it may, certifying pleadings are one thing and certifying motions are quite another. Furthermore, the Court relied on facts asserted in the motion in order to determine that the suit was destined for the Municipal Court; yet, the Court could have decided once and for all that the publications were not libelous per se, and so grant judgment. Or even if the Court felt that the publications were libelous per se it could have held that the uncontroverted exhibits and affidavit justified appellants' statements in such publications because they were true.

III

THE APPELLATE COURT HAS THE POWER AND SHOULD ENTER SUMMARY JUDGMENT FOR THE APPELLANTS

Only one issue remains in this extremely simple case, to wit: Are the publications libelous per se? This Court should enter summary judgment for the appellants; that this Court has the power is no longer in question. Professor Moore very cogently states (and he is supported judicially) as follows:

> "On reversal of a summary judgment may the Appellate Court order summary judgment for Appellant? Fountain v. Filson[1] is the leading case dealing with this problem. Although the Supreme Court there reversed the Court of Appeals for ordering summary judgment for the Appellant, for reasons previously stated, we believe that this case does not deny the existence of appellate power to dispose of a case in accordance with the law and the fact; and under certain circumstances this will include a reversal with directions to enter judgment for Appellant.[2] In other words we believe an Appellate Court has the power to order summary judgment for Appellant, both where he made no motion[3] and also where he made a cross-motion[4] in the trial Court, although the power must be cautiously used to the end that the Appellee is not deprived of a trial of a genuine issue of material fact underlying his claim or defense." (emphasis supplied) Moore's Federal Practice, 2nd ed., Vol VI, Sec. 56.27(2), at page 2367.

In support of the foregoing principle Professor Moore relies on Fountain v. Filson (1949) 336 U.S. 681, 69 S.Ct. 754, 93 L.Ed. 971, 12 FRS 56.54 and Elder v. Brannon (1950) 87 U.S. App. D.C. 117, 184 F 2d 219; reversed on other grounds (1951) 341 U.S. 277, 289, 71 S.Ct. 685, 95 L.Ed. 939.

A review of the unverified complaint, the unopposed factual accounts and statements appearing in appellants' exhibits and affidavit in support of their request for summary judgment reflects that final disposition is warranted without further remand, and therefore the Appellate Court should enter summary judgment for appellants.

CONCLUSION

Appellants respectfully request that the Court enter summary judgment for the appellants, or either of them; or in the alternative, vacate the order in this cause and order the District Court to enter summary judgment on the mandate of this Court; or in the alternative,

vacate the order in this cause and order the District Court to rule on the motion for summary judgment and, if denied, to afford appellants ten days within which to file a responsive or other pleadings before finally certifying this cause to the Municipal Court for the District of Columbia for trial as warranted by subsequent pleadings.

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N. W.
Washington 5, D. C.
Attorney for Appellants

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JOINT APPENDIX

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7 [Filed September 20, 1957]

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

DAVID GALFOND
601 Elm Avenue
Takoma Park, Maryland

Plaintiff

vs. No. 2379-57

ALVIN EPSTEIN, INC.,
a corporation,
1737 F Street, N.W.
Washington, D.C.

AND

ALVIN EPSTEIN
1737 F Street, N.W.
Washington, D.C.

Defendants

COMPLAINT

(For Libel)

First Count

1. Jurisdiction of this Court exists by virtue of Title 11, Sections 301, 305 and 306 of the D. C. Code. The amount in controversy, exclusive of interest and costs, exceeds $3,000.00.

2. Defendant Alvin Epstein, Inc., is a corporation organized and existing under the laws of the State of Maryland and doing business in the District of Columbia.

3. Defendant Alvin Epstein is President of defendant Alvin Epstein, Inc., and is sued herein in his own right.

4. On and prior to July 12, 1957, plaintiff was an employee of the defendant corporation in the capacity of account executive; plaintiff enjoyed a good name, credit and respect in the District of Columbia and elsewhere, in the advertising field, and his reputation constituted a business asset of great value of plaintiff.

5. On or about July 19, 1957, defendant corporation, by and through its agent, Alvin Epstein, defendant herein, wrote and published in the District of Columbia of and concerning the plaintiff and of and concerning plaintiff in his business and professional capacity as an advertising account executive, false and defamatory material contained in a letter to Larrabee Associates Advertising, copy of which is attached hereto, marked Exhibit A.

6. The matter so published is untrue, false and defamatory, and at the time of publication defendants knew or could have ascertained with the exercise of reasonable care, that said matter contained therein was untrue.

7. In said publication, defendants were actuated by malice and in wanton and reckless disregard of plaintiff's rights, and without just cause or excuse wrongfully and wilfully intended by such publication to injure plaintiff in his reputation, good name and profession.

8. By reason of said libelous publication, plaintiff has been irreparably injured in his profession as an advertising executive; his reputation and standing in his profession has been impaired.

WHEREFORE, plaintiff demands judgment against defendants, and each of them, in the sum of $25,000.00 as compensatory damages, and $25,000.00 as exemplary damages, with costs of suit.

Second Count

Paragraphs 1, 2, 3 and 4 of First Count are adopted and made part hereof.

5. On or about July 19, 1957, defendant corporation, by and through its agent, Alvin Epstein, defendant herein, wrote and published in the District of Columbia of and concerning plaintiff in his business and

professional capacity as an advertising account executive, false and defamatory material contained in a letter to Mr. Leonard Solomon, Home, Inc., copy of which is attached hereto, marked Exhibit B.

6. Said letter meant and was understood to mean that defendants charged plaintiff with removing art work from defendant's files without their knowledge or permission.

7. The matter so published is untrue, false and defamatory, and at the time of publication defendants knew or could have ascertained with the exercise of reasonable care, that said matter contained therein was untrue.

8. In said publication, defendants were actuated by malice and in wanton and reckless disregard of plaintiff's rights, and without just cause or excuse wrongfully and wilfully intended by such publication to injure plaintiff in his reputation, good name and profession.

9. By reason of said libelous publication, plaintiff has been irreparably injured in his profession as an advertising executive; his reputation and standing in his profession has been impaired.

WHEREFORE, plaintiff demands judgment against defendants, and each of them, in the sum of $25,000.00 as compensatory damages, and $25,000.00 as exemplary damages, with costs of suit.

SPIEGLER AND ALPHER

By: /s/ Sol M. Alpher

SOL M. ALPHER
Attorneys for Plaintiff

* * * * * * * *

Plaintiff demands jury trial.

/s/ Sol M. Alpher

10

ALVIN EPSTEIN ADVERTISING
1737 F Street, N. W.
Washington, D.C.

July 19, 1957

Mr. Bert Silverman
Larrabee Associates Advertising
2000 P Street, N.W.
Washington, D.C.

Dear Bert:

On Wednesday, July 12, 1957, Dave Galfond informed us that he was leaving our employ as of July 14.

At the same time he informed us, when questioned about the status of reassignment of accounts, which he was handling for this agency, that he had already "sold" several of our accounts to your agency, specifically the Silver Spring Motor Co. and Continental Motors.

We feel that this is not only a breech of fair play, elementary ethics, but borders on dishonesty, for while Dave Galfond was in our employ and receiving compensation for all advertising performed by these two accounts, he was negotiating with you in the sale of these accounts, knowing that he was going to leave our employ on Friday, July 14.

We have seen a letter addressed to one of the radio stations announcing that effective Tuesday, July 16, you were the new advertising agency. This certainly would indicate that you "took over" immediately upon the resignation of Dave Galfond from this agency, which would seem to bear out these facts.

We are shocked that your agency chose first to negotiation with an employee of ours and conspire to hurt us, both financially and prestige-wise. In my eleven years as an advertising agency, owner and operator, I have heard of no similar experience.

We would like to hear from you if our facts are correct or not, so we may know how to evaluate this situation.

Yours very truly,
ALVIN EPSTEIN ADVERTISING
ALVIN EPSTEIN

11

ALVIN EPSTEIN ADVERTISING
1737 F Street, N. W.
Washington, D.C.

July 19, 1957

Mr. Leonard Solomon
Home, Inc.
7641 New Hampshire Avenue
Takoma Park, Maryland

Dear Mr. Solomon:

I notice that you have run two ads in the newspapers that represent art work which we created and used for you in previous advertisements when we were your advertising agency.

We made no charge for this art work since it acted as partial consideration for producing your advertising, and consequently you didn't pay for this art. It was part of our package deal for advertising which we produced for you.

Since you are now creating your own advertising, we feel that should you wish to use the art work, for which we made no charge at the time when you used it, we will have to make a charge for such use, now.

We might add that this art work was taken out of our files without our knowledge or permission and we would suggest that it be returned immediately. We will then be glad to discuss its further use with you, should you wish to purchase such art work.

Since you may not have been aware of these circumstances, we certainly do not wish to embarrass you nor press payment for the two ads which have run, but we must advise you that if you continue to run any advertising with this art work, we will have to bill you for such and enforce payment.

Yours very truly,
ALVIN EPSTEIN ADVERTISING
/s/ Alvin Epstein

12 [Filed October 11, 1957]

MOTION OF EACH DEFENDANT FOR SUMMARY JUDGMENT; OR IN THE ALTERNATIVE FOR SECURITY OF COSTS OF THIS ACTION

Comes now the defendant, Alvin Epstein Advertising, a body corporate, (erroneously designated as Alvin Epstein, Inc.) and the individual defendant, Alvin Epstein, by and through their attorney, and respectfully move for summary judgment on both counts of the plaintiff's complaint, or in the alternative for security of costs of this action, and as ground therefor refers to the following:

1. It is apparent that plaintiff has brought this action which is without foundation of law or in fact, solely because he seeks retaliation since defendant corporation has sued plaintiff in the Municipal Court for the District of Columbia for an advancement of commissions in the sum of $1,230.87 as shown by defendant's exhibits I, J-1 and J-2 attached hereto and made a part hereof.

2. Each defendant's points and authorities and the affidavit of Alvin Epstein, attached hereto and made a part hereof, conclusively show that they are entitled to judgment as a matter of law for the following showing made.

a) Without determining whether a letter of defendants constitutes a defamation, the complaint fails to allege special damages as required by the Federal Rules of Procedure. Furthermore, plaintiff pitches his case on two letters written to Larrabee Associates and Home, Inc.

13 If the letters were defamatory the defamation was published to these two corporations. Assuming arguendo, there is libel contained in each letter attached to plaintiff's complaint, was the plaintiff damaged in his profession as an advertising executive as he alleges in paragraph eight of the complaint?

The answer is no. Larrabee associates "were interested enough in Mr. Galfond's manner of presentation to offer him a position with us two days following the initial interview. As you know, Mr. Galfond did not accept our offer. * * *" See defendant's exhibit C Attached hereto and

made a part hereof. This communication is dated some 12 days after the alleged libel. It is irrefutably clear, that Galfond did not suffer in any way so far as Larrabee associates were concerned. Judgment must be entered on count one for failure to show some ascertainable damage.

c) Assuming arguendo, that count two of the complaint alleges a libelous defamation by letter addressed to Home, Inc. How was Galfond held up in ridicule or disrepute in the eyes of Home, Inc.? The answer is he was not. The affidavit of Mr. Epstein shows that Galfond has been employed by Home, Inc. after he resigned from defendant's employment. Furthermore, the Municipal Court suit shows that he was served with papers at Home, Inc. as reflected on defendant's exhibit "I". It is irrefutably clear, that Galfond had an offer of work for Larrabee, but refused it because he obtained a better offer from Home, Inc. Since count two concerns a letter written to Home, Inc., Galfond can show no ascertainable damage with reference to that letter, therefor, it follows that summary judgment must be entered on count two of the complaint for failure to shown some ascertainable damage.

3. Aside from the matters relating to ascertainable damage, the complaint fails to show how Galfond was libeled unless it be from the face of the letters themselves.

a) A study of the letter to Larrabee (see defendant's copy known as defendant's exhibit "A") shows that no charge of any kind is made against Galfond. It states that Galfond may have sold certain clients of defendant to Larrabee. The letter merely inquires if this is true. Defendant's exhibit D
14 is a second letter to Larrabee renewing the same inquiry and is based upon statements of Galfond himself who told Epstein that clients were sold to Larrabee, a competitor of defendant. Defendant's exhibit "F" is an admission by Larrabee that Galfond did refer the accounts to Larrabee which is confirmed by defendant's exhibits "G" and "H" attached hereto and made a part hereof.

Whether Galfond actually sold those accounts or whether Galfond actually referred these accounts does not create any GENUINE issue of fact in this case. The truth is that Larrabee did get these accounts from Galfond.

FURTHERMORE, defendant's never accused Galfond of selling the accounts, the letters clearly asked whether Galfond did sell the accounts. See defendant's exhibit "A" and "D".

Since the letter to Larrabee contains no libelous material against Galfond, Summary judgment must be entered for each defendant on Count One.

b) A study of the letter to Home, Inc. (see defendant's copy known as defendant's exhibit "B") shows that no reference is made to Galfond at all by name or by innuendo. Home, Inc. was a client of defendant. It used art work prepared by defendant. This letter merely asks for its return. It is a permissible and reasonable communication in the course of its business to a client. Mr. Galfond was apprised of the situation and he was told that no one gave him permission to give Home, Inc. (his new employer) art work of the defendant. This is all corroborated by the fact that Home Inc. has actually returned the art work to the defendants after receiving the letters. For the letter sent to Galfond see defendant's exhibit "E" attached hereto and made a part hereof and for return of art work see affidavit of Alvin Epstein marked as exhibit "K". Thus it is irrefutably shown that the whole matter concerned art work which has been since returned to the defendant, that the plaintiff is not mentioned in the letter and whether he had permission or not is not material or genuine issue in this cause, but if it is, the evidence is clear that Galfond had no permission to take such art work is clear. However, the four corners of the letter reflects no defamatory matter against the plaintiff, nor does it appear to have made any difference to Galfond's new employer, Home, Inc. since the art work was returned to defendant's. Accordingly, no showing of libel is made on count two concerning the letter written to a client of the defendant, therefor, summary judgment must be entered for each defendant on count two of the complaint.

Notwithstanding any of the foregoing, it is true that Galfond referred accounts to Larrabee Associates, and it is true that Home, Inc. did not have the right to retain art work of defendant which they later returned, and unless Galfond can show a conflict or lack of truth in the attached affidavit and exhibits, there is no genuine issue as to the defense of truth and a summary

judgment must be entered for each defendant on the entire complaint.

In paragraph 7 of count one and paragraph 8 of count two, Galfond alleges malice in defendant's actions as applied to plaintiff. The complaint shows no malice. The letter to Larrabee is in the nature of an inquiry made to a competitor of defendant and shock if the conduct of its competitor is true. The letter was a reasonable inquiry and not bent upon malice. The letter to Home, Inc. concerned the continued use of art work and asked for its return or for compensation if used continually. This is a reasonable inquiry made to its client, and shows no act bent on malice in writing such letter. The entire situation as shown by defendant's affidavit and attached exhibits conclusively shows no malice, and unless plaintiff on this motion can make a showing of malice on this issue, there is no genuine or material issue or fact and judgment for each defendant must be entered summarily on each count of the complaint.

In any event the complaint that the alleged libelous matter was uttered by Alvin Epstein individually nor can plaintiff sustain the charge. The attached letters show that at all time s the matters were written on stationary of Alvin Epstein Advertising and executed as solely a corporate act; and that it was signed under the signature of Alvin Epstein Advertising. Therefor, Summary judgment must be entered on each count of the complaint in favor of Alvin Epstein.

16 or in the alternative ---IN the event the aforegoing motion is denied;

MOTION FOR SECURITY OF COSTS OF THIS ACTION

Defendant will be required to utilize discovery procedures liberally in order to fully and adequately defend itself from the charges made in the complaint.

Specifically, defendant will be required to take depositions of the plaintiff, the officials at Larrabee Associates, Inc.; and the officials at Home, Inc. In addition other court costs will be incurred with the possibility that they may all be taxed against the plaintiff in this cause.

Since it appears that the plaintiff is a non-resident of the District of Columbia residing at 601 Elm Avenue, Takoma Park, Maryland as apparent

from the face of the complaint of the plaintiff.

The Code of the District of Columbia provides that non-resident plaintiffs may be required to file an undertaking in order to insure payment of costs assessed against him.

WHEREFORE, the premises considered, each defendant prays that the plaintiff be required to file an undertaking with an approved surety in the sum of $1,000.00.

/s/ Edward J. Skeens
Attorney for Defendants

* * * * * * * * *

[CERTIFICATE OF SERVICE]

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19 [Filed October 11, 1957] Defendant's Exhibit "C"

HEADQUARTERS BUILDING
2000 P STREET, N.W.
WASHINGTON 6, D.C.
ADAMS 2-2400

July 24, 1957

Mr. Alvin Epstein
Alvin Epstein Advertising
1737 F Street, N. W.
Washington, D.C.

Dear Al,

In the early part of July, Dave Galfond approached this agency seeking employment as an account executive. He had heard, and correctly so, that we were contemplating the expansion of our sales department.

Mr. Galfond cleared the air immediately by stating he was leaving your employ whether or not we hired him, and whether or not he even remained in the advertising business. Needless to say, it would be exceptionally difficult, even on the remotest basis, to draw conclusions that require the use of such words and phrases as "dishonesty," "breach of fair play," elementary ethics," etc.

The interview was conducted like any employer-employee meeting ever held. At that time, we were more impressed with Mr. Galfond's manner, apparent ability, and potential capacity than we were in the business he might possibly be able to bring with him at an early date. This agency has never in its history hired an account executive with billing away from another agency; nor have we ever purchased accounts. This cannot be said of all others in the business -- which again indicates an especially loose use of such strong words as "dishonesty."

We were interested enough in Mr. Galfond's manner of presentation to offer him a position with us two days following the initial interview. As you know, Mr. Galfond did not accept our offer, and remained true to his stated position that he would not remain with the Epstein organization even if it meant leaving the advertising field which he liked so well.

That is the entire extent of our dealings with Mr. Galfond.

Sincerely,

LARRABEE ASSOCIATES

/s/ Jack

John L. Neff
Director of Sales

cc: Mr. Dave Galfond

---

20 [Filed October 11, 1957] Defendant's Exhibit "D"

July 26, 1957

Mr. John L. Neff
Larrabee Associates Advertising
2000 P Street, N.W.
Washington 6, D.C.

Dear Jack:

I am in receipt of your letter of July 24, in which you outline your position insofar as Dave Galfond is concerned.

I can understand such negotiation with Galfond on the assumption that he was unhappy with my organization and wanted to accept a job with yours.

However, that wasn't the reason for my writing you - to register a complaint about his seeking employment with you, which he certainly was entitled to do. The point I made, and was pretty specific about was that - in conversation with Dave, in the presence of my secretary, he specifically said:

"Al, you won't like what I'm going to tell you, but I sold my accounts, specifically the Silver Spring Motor Co. and Continental Motors, to the Larrabee Agency."

That's what I'm curious to know - did he or did he not "sell" you or your agency these accounts for a cash consideration.

I'd appreciate a direct answer to this question, and if he didn't tell me the truth, then I'll apologize all over the lot of using such expressions as "dishonesty", "breach of fair play", etc.

Sincerely yours,
ALVIN EPSTEIN ADVERTISING
ALVIN EPSTEIN

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21 [Filed October 11, 1957] Defendant's Exhibit "E"

July 19, 1957

Mr. Dave Galfond
Home, Inc.
7641 New Hampshire Avenue
Takoma Park, Maryland

Dear Mr. Galfond:

We notice that our files of art work of Home, Inc. have been removed.

No one in our employ recalls that you asked for it or that permission was ever allowed for you to remove such art work from our possession.

We must assume that you were the party to remove this art work, since two pieces of this art have already appeared in newspaper advertisements for Home, Inc.

We have today written a letter to Mr. Solomon apprising him of this situation, and suggesting that this art work be returned as it was never

purchased by Mr. Solomon and does not belong to him, nor to you.

If this art work is not returned within five days, we will have to make a charge for this work to Home, Inc. Specifically we are talking about all the border and headline art which we did when we were handling the account. Any art which was in our files that doesn't fall into this category, we certainly have no need for, but even this shouldn't have been removed from our premises without permission.

We have turned over to Mr. Skeens your drawing account delinquency and suggest that you contact him as to arrangements which you may want to make in order to repay us the money you owe us.

We urge you to contact Mr. Skeens within five days as he has instructions from us to proceed with suit against you after that time in order to recover these advance moneys which are charged against your account.

Yours very truly,
ALVIN EPSTEIN ADVERTISING
ALVIN EPSTEIN

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22 [Filed October 11, 1957] Defendant's Exhibit "F"

HEADQUARTERS BUILDING
2000 P STREET, N.W.
WASHINGTON 6, D.C.
ADAMS 2-2400

August 2, 1957

Mr. Alvin Epstein
Alvin Epstein Advertising
1737 F Street, N.W.
Washington, D.C.

Dear Al,

In reply to your direct question: "...did he or did he not 'sell' you or your agency these accounts for a cash consideration," the answer is no.

Dave did refer us to the accounts in question. And they were followed up, since there seemed to be a direct conflict of interests concerning other accounts in your agency.

Sincerely,

LARRABEE ASSOCIATES

/s/ Jack

John L. Neff
Director of Sales

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23 [Filed October 11, 1957] Defendant's Exhibit "G"

LARABEE ASSOCIATES ADVERTISING

Mr. Bert Libin
Sales Director
Radio Station WMAL
4461 Conn. Ave., N.W.
Washington, D.C.

Dear Sir,

This will serve to inform you that, effective July 16, 1957 all copy and orders for Continental Motors, Ltd. will be placed with you through Larrabee Associates Advertising, Washington, D.C.

In order to make transition as smooth as possible, please have your accounting department bring all balances up to date, so that our termination agreements with our present agency may be completed.

We appreciate your past cooperation, and look forward to a continued happy relationship in the future.

Sincerely,

/s/ Walter R. Dickson

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24 [Filed October 11, 1957] Defendant's Exhibit "H"

SILVER SPRING MOTOR CO., INC. OF D.C.
7601 Georgia Avenue
Washington, D.C.

July 15, 1957

Epstein Advertising Agency
1737 F. St., N.W.
Washington, D.C.

Dear Sir:

This is to advise you that as of this date we will be transferring our account to another agency.

This includes all of my operations, Silver Spring Motor Co., Inc. of Md., Silver Spring Motor Co., Inc. of D.C., Continental Motors Ltd.

Thank you for the past business relations we have had.

/s/ Walter R. Dickson, Pres.

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28 [Filed October 31, 1957]

ORDER CERTIFYING CAUSE TO THE MUNICIPAL COURT

It appearing to the satisfaction of the Court at the Pre-Trial hearing hereof that this action will not justify a judgment in excess of Three Thousand Dollars ($3,000.00), it is by the court this 31st day of October, 1957.

ORDERED, that said action be and the same hereby is certified to the Municipal Court for the District of Columbia for trial.

/s/ John J. Sirica
JUDGE

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29 [Filed November 5, 1957]

NOTICE OF APPEAL

Notice is hereby given this 5th day of November, 1957, that Alvin Epstein, Inc. and Alvin Epstein, defendants herein, hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court certifying this cause to the Municipal Court for the District of Columbia entered on the 31st day of October, 1957 in favor of David Galfond against said Alvin Epstein, Inc. and Alvin Epstein, defendants.

/s/ Edward J. Skeens
Attorney for each defendant

* * * * *

COPY TO:

Spiegler & Alpher
Attorneys for Plaintiff
Southern Building
Washington 5, D.C.

Pursuant to Rules 33 (b & c) of the U.S. Court of Appeals, notice is hereby given that application to reporter for transcript of proceedings on October 31, 1957, Sirica, J. has been made.

/s/ E. J. Skeens

1 [Filed November 26, 1957]

TRANSCRIPT OF PROCEEDINGS

Washington, D.C.,
October 31, 1957.

Above-entitled matter came on for hearing before HONORABLE JOHN J. SIRICA, United States District Judge,

APPEARANCES:

For the Plaintiff:

Sol M. Alpher

For the Defendant:

Edward J. Skeens.

2 PROCEEDINGS

THE CLERK: No. 18, Galfond v. Epstein, Inc.

THE COURT: This is a case involving a libel suit.

Let me ask you a question, Mr. Alpher. In this case you have sued for $25,000. I do not think you have set forth any special damages that you claim your client suffered. You are proceeding on the theory that these words are objectionable per se, and therefore you don't have to plead special damages. That is the theory of your case?

MR. ALPHER: That is right.

THE COURT: I have read over the letters which were written by the defendant regarding your client. I have read the pleadings in the case.

Can you show the Court where you would be justified or you think a jury would be justified in returning a substantial verdict in this case? I mean, over $3,000, based on what you have in the file.

MR. ALPHER: I think I am entitled to try. These are serious allegations against the man's reputation in that field. We have asked not only for compensatory but punitive damages. We think that a jury is entitled to hear that. That is strictly our position, that we think we are entitled to be in this court on that allegation.

I think this is a situation which reasonable men can differ in.

3 These letters have to be considered in their context: Gariepy v. Person case:

"It is only when the Court can say the publication is not reasonably capable of defamatory meaning and can not be reasonably understood in a defamatory sense that the Court can rule"--

THE COURT: I am not ruling on that point. I am discussing whether or not this is the type of case that a jury might exercise their discretion in and assess punitive damages, say in the sum of $10,000 or $20,000 or $50,000.

MR. ALPHER: I think it is possible.

THE COURT: I have to consider whether or not this case should remain in this court or be certified in Municipal Court.

MR. ALPHER: Wouldn't the time for that be after the answer is in and the interrogatories? There has been no answer filed yet.

THE COURT: The answer to the complaint was filed on September 20th.

MR. SKEENS: There is no answer.

THE COURT: You filed a motion for summary judgment.

MR. ALPHER: That is the only thing before the Court.

THE COURT: I think I am going to exercise the discretion I have and sit as pretrial judge and certify it to Municipal Court.

4 MR. SKEENS: May I be heard on that?

THE COURT: Yes.

MR. SKEENS: I don't think that would be a proper way to dispose of this case on summary judgment procedure.

I think this Court has the jurisdiction to decide the motion for summary judgment although I agree with Your Honor that this is definitely a municipal court case.

It seems to me if Your Honor will study the suit you will see there is a three-page complaint containing two counts and we have the points and authorities in opposition, two pages, signed by counsel, and that is the entire

basis that they hope to stay not only in this court but in any court.

The defendant has gone through the trouble of preparing the opposition, an affidavit which is uncontroverted at this point.

All the statements in the exhibit are all uncontroverted. I think it clearly shows that there are no special damages in this case nor can they be alleged or proven by the fact that they remain silent. The only issue here is whether or not he may conceivably have a case on the ground that the publication could be construed to be libelous per se. That is the only way he hopes to stay in court.

I think that is disposed of by the case of Schoen v. Washington Post, decided May 13 of 1957 by our Court of Appeals, reported in 246 Fed 2d.

5 on page 670. That was a dance studio operator's libel action against a newspaper based on publication of a report of a police vice squad radio on the studio.

It was rented by a private organization.

Your Honor may have come across this case recently.

In the opinion by Judge Berger, who said that the suit made a claim for injuries based on the damages for libelous articles the motion granted by Judge McGuire was dismissed.

I think it is interesting to note that this was a claim for damages to the reputation and business, which is the same claim here, and Note 1 on page 671 says the Trial Court had ruled earlier that the publication was not libelous per se to appellant, and consequently no allegations of special damages were necessary.

Judge McGuire ruled that damages to the reputation and business of the dance studio were not libelous per se. That is a question of law and I think Your Honor can see there is nothing in the exhibits, the two letters, attached to the complaint showing anything libelous per se.

The defendant is not required to guess and speculate and help him and see how he can show libelous action per se.

Even if he could show, this case clearly shows, as Judge McGuire has ruled in this case, that reputation and business damage to this organization was not libelous per se.

I think the Court should grant the summary judgment.

THE COURT: I disagree with you on that. I think when I certify a case to the Municipal Court and there is a motion to dismiss, or summary judgment, I think the judge who hears the case over there, of that court, should have an opportunity to pass on the motion, and also let me set the bond for security of cost over there.

You can raise the whole thing in one motion. We will certify the whole case.

MR. SKEENS: I was going to suggest that the order state that the motion for summary judgment has not been ruled upon by this Court.

THE COURT: They will know that. I am sending the whole case over there--motion for summary judgment and motion for security cost.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,234

ALVIN EPSTEIN, INC.,
ALVIN EPSTEIN

Appellants,

v.

DAVID GALFOND

Appellee.

United States Court of Appeals
For the
District of Columbia Circuit
FILED JAN 23 1958
Joseph W. Stewart
CLERK

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOUIS E. SPIEGLER
SOL M. ALPHER
ERNEST M. SHALOWITZ

Southern Building
Washington, D. C.

Attorneys for Appellee

Robert I. Thiel, Printer
Washington, D. C.
EX 3-0625

STATEMENT OF QUESTION PRESENTED

In the opinion of appellee, the sole question presented is whether the District Court had the authority to certify the entire cause to the Municipal Court for the District of Columbia while a motion for summary judgment was pending before said Court.

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CASES CITED

Barnard v. Schneider, et al., ___ U.S. App. D.C. ___, 243 F. 2d 258, 1957	3

OTHER REFERENCES

District of Columbia Code (1951) Title 11, Section 756	2
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UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 14,234

ALVIN EPSTEIN, INC.,
ALVIN EPSTEIN,

Appellants,

v.

DAVID GALFOND,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

PRELIMINARY STATEMENT

The procedural facts as set forth in appellants' brief are an accurate statement of the case.

SUMMARY OF ARGUMENT

The District of Columbia Code specifically provides for certification of cases from the District Court to the Municipal Court "at any time prior to trial" if it be deemed that the action will not justify a

judgment in excess of $3,000.00. The disposition of pending motions is not a condition precedent to the District Court's exercise of discretion in certification of cases.

Appellant's contention that this Court may grant summary judgment is without merit since only the District Court's order of certification is before this Court.

ARGUMENT

I

The District Court Has The Authority To Certify A Case To The Municipal Court At Any Time Prior To Trial.

The District of Columbia Code, Title 11, Section 756, as amended in 1956, specifically provides for certification of cases to the Municipal Court at any time prior to trial. Prior to its amendment in 1956, this section of the Code authorized certification at any pre-trial hearing. Appellants contend that the 1956 amendment limits certification to a period of time well after pre-trial. It is evident, however, that Congress intended to enlarge rather than limit the authority of the District Court in certifying cases to the Municipal Court when it is considered that the primary purpose of the 1956 amendment was to allow the District the discretion in certifying cases where it appeared the action would not justify a judgment in excess of $3000, whereas prior to the 1956 amendment the standard for exercise of the District Court's discretion was $1000.

Appellee does not contend that the District Court should have certified the entire cause to the Municipal Court. Appellee merely submits that Title 11, Section 756, of the Code does not require the District Court to dispose of pending motions or await an answer to the complaint prior to certification.

II

This Court Lacks The Authority To Grant Appellants' Motion For Summary Judgment Or Order The District Court To Grant Said Motion.

This appeal is from the District Court's order of certification. (J.A. 15) Appellants contend that this Court has the power and should enter summary judgment for said appellants. Undoubtedly, under certain circumstances, this Court may grant summary judgment. Appellants, however, misconstrue the citation from Professor Moore's treatise in applying it to the instant case. Moore's Federal Practice, 2nd Ed., Vol. VI, Sec. 56.27(2), p. 2367. Professor Moore is clearly referring to a class of cases where an appellee has been granted summary judgment and the appellant seeks a reversal of that order. In the instant case, this Court does not reach the question of appellants' motion for summary judgment since the only final and appealable order present in this case is theDistrict Court's order of certification. This Court's review of that order comes within the purview of Barnard v. Schneider, et al, ___ U.S. App. D.C. ____, 243 F. 2d 258, 1957 and is reviewable where an abuse of discretion is alleged.

CONCLUSION

WHEREFORE, it is respectfully submitted that this appeal be dismissed.

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